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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

BRYAN GOEKE,
Superintendent, Renz Correctional Center

Petitioner,

v.

LYNDA RUTH BRANCH,

Respondent.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Eighth Circuit

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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On March 3, 1989, the Circuit Court of Boone County convicted Lynda Ruth Branch of first-degree murder. The jury assessed her punishment as life imprisonment without eligibility for probation or parole. App. 44. Branch was released on bond and the case was set for April 3, 1989 for the disposition of her new trial motion and sentencing. Branch did not appear. App. 48-49. The trial court issued a capias warrant for Branch's arrest and it was ordered that she be held without bond. App. 53.

On April 6, 1989, Branch was arrested by law enforcement officers in Moniteau County, Missouri. She was returned to the Circuit Court of Boone County, Missouri on April 10, 1989 for sentencing. App. 76. Branch was then sentenced to life imprisonment without eligibility for probation or parole. App. 57. On April 10, 1989, the same day of the sentencing, Branch filed her Notice of Appeal. App. 3. Branch also filed a Motion for Post-Conviction Relief pursuant to Mo. S.Ct.R. 29.15. After an evidentiary hearing, the motion court denied the relief and filed Findings of Fact and Conclusions of Law on April 20, 1990. App. 62-72. This Order was entered by Judge Frank Conley who was also her trial judge. The decision on her post-conviction relief was timely appealed and consolidated with her direct appeal.

The State moved to dismiss both appeals on the basis of the escape rule. The Missouri Court of Appeals took the State's motion with the case and briefs were submitted on the merits. After oral argument, the court dismissed Branch's consolidated appeal on the fugitive escape rule. No decision was made addressing the merits of her claims. App. 76-78, 811 S.W.2d at 12. No evidentiary hearing was ever held to determine the reason for the respondent's failure to appear for sentencing. App. 18.

The Respondent filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Missouri and raised sixteen grounds for relief. App. 84-90. In paragraph 12 a. of the petition, the respondent alleged the dismissal of the consolidated appeal denied her due process of law and equal protection of the law because (1) while she was in custody she had complied with all the statutory requirements for filing an appeal under the statutes and rules of the State of Missouri; (2) she did not escape from custody; (3) there was no prejudice to the appellate process resulting from her three day absence from April 3, 1989 to April 6, 1989; (4) the denial of the appeal denied her a fair trial because none of the issues raised in her consolidated appeal was ever addressed on the merits by an appellate court. App. 84-85.

The State's response was that the district court and other federal courts had allowed the escape rule to be applied in other circumstances. App. 97-98. The State also addressed the issue of *Teague v. Lane*, 489 U.S. 288 (1989), asking the court to state as a threshold matter whether the rule was one "implicit in the concept of ordered liberty" and should be applied retroactively. App. 99-100. The State also raised the issue that by her escape she had forfeited consideration of her other grounds for relief. App. 100-104.

The decision of the district court addressed the due process, equal protection and procedural default claims. App. 20-26. The largest portion of the opinion addressed the due process claim. The court applied the analysis of *Mathews v. Edwards*, 424 U.S. 319, 335 (1976) and held that her right to due process was not violated because her absence was not due to events beyond her control. App. 24.

The district court's judgment was made on September 23, 1992. App. 26. The district court denied respondent's motion for certificate of probable cause to appeal. The United States Court of Appeals for the Eighth Circuit granted her appeal on February 5, 1993.

The Respondent filed her brief on May 7, 1993 and presented one question on appeal:

THE DISTRICT COURT ERRED IN DENYING THE PETITIONER'S WRIT OF HABEAS CORPUS BECAUSE THE MISSOURI COURT OF APPEALS VIOLATED HER CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN IT SUMMARILY DISMISSED HER CONSOLIDATED APPEALS BASED ON THE "ESCAPE RULE", IN THAT THE BLANKET APPLICATION OF THE "ESCAPE RULE" WAS ARBITRARY AND IRRATIONAL BECAUSE THE COURT FAILED TO CONSIDER THAT THE PETITIONER HAD NOT YET INITIATED THE APPELLATE PROCESS AT THE TIME OF HER ALLEGED ESCAPE, NOR DID HER ACTIONS BURDEN OR DELAY THE NORMAL APPELLATE PROCESS." App. 106.

In the State's brief filed June 18, 1993, the only responsive point was as follows:

THE DISTRICT COURT DID NOT ERR IN REJECTING THE PETITIONER'S CONTENTION THAT THE DISMISSAL OF HER APPEAL BY THE MISSOURI COURT OF APPEALS VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE THE MISSOURI "ESCAPE" OR "FUGITIVE DISMISSAL" RULE -- ON ITS FACE AND AS APPLIED TO THE PETITIONER - HAS A RATIONAL BASIS

IN CRIMINAL JURIS PROCEDURE, IN THAT IT DETERS ESCAPE, FAILURES TO APPEAR, AND OTHER FUGITIVE ACTS OR OMISSIONS, AND PROMOTES THE DIGNITY, EFFICACY, AND CREDIBILITY OF THE LEGAL SYSTEM AS A WHOLE." App. 117.

The only reference to Teague principle in the brief before the Court of Appeals was "in a one-sentence footnote buried on the last page of the State's lone argument". App. 5.

On June 28, 1994, the Court of Appeals issued its first opinion in this case holding that the Due Process Clause contains a substantive component which protects individuals from government action that is arbitrary, conscience-shocking or interferes with fundamental rights and the application of the escape rule to Branch violated her due process rights based on nothing more than her failure to appear is clearly at odds with Missouri recognition that a convicted defendant's liberty should not be curtailed unless a second decision-maker was convinced the conviction was in accord with law. App. 34. A dissent was filed by Judge Bowman. App. 9.

The State filed a suggestion for rehearing en banc. On September 21, 1994, the Eighth Circuit denied rehearing en banc. Four judges would have granted rehearing. The panel issued revised majority opinion which issuing the writ and ordering the appeal to be heard. A dissenting opinion was filed. From this opinion, the State filed this petition.

ARGUMENT

I. THE COURT BELOW DID NOT DECIDE A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

The Court below decided that Lynda Branch's constitutional right to due process was violated by the Missouri Court of Appeals' dismissal of her appeal for her failure to appear for sentencing at the trial court. The Court stated this action was clearly at odds with Missouri's recognition that a convicted defendant's liberty should not be curtailed "unless a second judicial decision-maker, the Appellate Court, was convinced that the conviction was in accordance with the law." App. 9.

It appears to be the position of the Petitioner herein that because there is no constitutional obligation on the State to establish a system of appeals as of right in the first instance, it is immune from all constitutional scrutiny when it elects to implement such a system, including the mandates of due process.

At no time in the proceedings below was it ever represented that there is a constitutional mandate which dictates to the State that they must establish an appellate process and guarantee criminal defendants the opportunity to review alleged trial errors. This was rejected by this Court in *McKane v. Durston*, 153 U.S. 684 (1894), and appears to be the law today. It is the position of this respondent that once Missouri elected to establish an appellate process into Missouri's criminal justice system, the appellate procedures must comply with the Due Process Clause of the Federal Constitution's Fourteenth Amendment. This rule was established in *Evitts v. Lucey*, 469 U.S. 387, 402 (1985) when it stated:

"In short, when a State opts to act in a field where its action has significant discretionary elements, it must none the less act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause."

This Court stated in response the argument advanced therein that there was no constitutional right to an appeal that, *Id.* at 393, "Nonetheless, if a state law has created appellate courts as" 'an integral part of the . . . system for finally adjudication the guilty or innocence of a defendant,' *Griffin v. Illinois*, 351 U.S. 12 (1956), the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clause of the Constitution."

The State of Missouri has elected to establish an appellate procedure which gives an appeal as a matter of right and dictates this appeal "shall be allowed" in all cases. Mo. Rev. Stat. §547.070 (1986). Recognizing the importance of this right in the Missouri criminal process, the Missouri Supreme Court established a rule which allows a defendant to appeal out of time within twelve months of the judgment being final. Mo. S.Ct.R. 30.03. In this case, the respondent was to appear for sentencing on April 10, 1989 before the Circuit Court of Boone County, Missouri. She did not appear and a capias warrant was issued for her arrest. She was found on April 6, 1989 and was returned to Boone County on April 10, 1989 and sentenced to a term of life imprisonment without possibility of parole. On April 10, 1989, respondent filed a Notice of Appeal to the Missouri Court of Appeals, Western District. This appeal was timely filed even if measured from the original sentencing hearing that was missed. Branch's three day absence caused no delay in the commencement of the appellate process. See Mo. S.Ct.R. 30.01(d) (notice of appeal must be filed within ten days of final judgment). A

timely motion for post-conviction relief was denied by the trial court. Both the direct and post-conviction appeals were consolidated. The merits of the case were fully briefed and orally argued. The Missouri Court of Appeals dismissed the consolidated appeals solely under the Missouri fugitive dismissal rule without addressing the merits of the case. App. 2. The question becomes was this action a violation of the respondent's Due Process rights under the Fourteenth Amendment of the Federal Constitution.

This Court must keep in mind that it is not the respondent's position that there is a fundamental right to an appeal under the Due Process Clause of the Fourteenth Amendment. It is the respondent's position that once the state established an appellate process, the appeal may not be denied in an arbitrary manner based on the established standards of due process. The respondent herein has not been afforded the opportunity to present her claims fairly in the State's appellate process. In fact, she has had not one review of any aspect of the trial court's decision. If at least an initial review by an appellate court is not an important procedural safeguard to insure a fair trial for a defendant in the criminal process, then there is no violation of Due Process. However, if this review is fundamental and essential to a fair and just proceeding, then due process will make the appeal obligatory on the State by the Fourteenth Amendment. This Court has previously recognized that there are certain safeguards which are necessary to make the appellate process fair for a criminal appellant pursuing their first appeal as of right. In *Griffin v. Illinois* 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963), the Fourteenth Amendment was held to guarantee a transcript and the right to counsel on appeal. In this case, we are addressing the appeal itself not just the minimum safeguards necessary to make the appeal adequate and effective.

The petitioner would justify the drastic step by denying the appeal on the basis that the respondent forfeited her right to appeal when she did not appear at sentencing.

This fugitive dismissal rule is thought to be needed to deter fugitive activity and to promote respect for the judicial system. In order for the dismissal to pass muster for Due Process, there must be some rational justification for a state appellate court to strip the respondent of her right to appeal. The state appellate court cannot deny the right to appeal through the arbitrary application of the fugitive dismissal rule, *Evitts, supra*, at 404-05; see also *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

There must be some showing that the pre-appeal flight of the respondent affected the appellate process. Even taking into consideration her three day absence, the appeal was timely filed. All procedural rules and time schedules were not altered by her absence and there is no deficiency in the perfection of her appeal. As stated in the court below, the abbreviated absence of the respondent did not have any effect on the operation or have any disrupting effect on the appellate system. App. 8. If the Court below reverses and orders a new trial, the three day absence would not have any effect on subsequent proceedings. In fact, this case has been briefed, orally argued and was in the bosom of the Missouri Court of Appeals before dismissal on the fugitive escape rule.

It should also be noted that the respondent's absence occurred before she initiated her appellate process. There was no attempt made by the trial court to impose sanctions or to initiate criminal proceedings for failure to appear. The absence occurred while the respondent was before the trial court and the dismissal sanction was subsequently imposed by the appellate court.

It is the respondent's position that this issue was decided by the reasoning of this Court in *Ortega-Rodriguez v. United States*, 113 S.Ct. 1199 (1993). In this case, this Court addresses the issue of whether a defendant may be deemed to forfeit the right to appeal by the appellate court by fleeing while this case is pending in the district court, after being recaptured before sentencing and appeal.

In *Ortega-Rodriguez*, the Court of appeals granted the

motion to dismiss without addressing the merits of the appeal, based on the holding of *United States v. Holmes*, 680 F.2d 1372, 1373 (1982), cert. denied, 460 U.S. 1015 (1983). Citing *Thomas v. Arn*, 474 U.S. 140, 146-148 (1985), this Court stated the Eleventh Circuit had taken the fugitive dismissal too far and required that the dismissal represent a reasonable exercise of the court's authority. The misconduct of the defendant at the lower court level must produce the result that makes "meaningful appeal impossible" or otherwise disrupt the appellate process so that an appellate sanction is reasonably imposed. This Court required that there must be some connection between fugitivity and the appellate process and it may not rest on nothing more than the faulty presence that any act of judicial defiance, whether or not it affects the appellate process, is punishable by appellate dismissal.

In the Branch appeal, the Missouri Court of Appeals based the dismissal entirely on judicial defiance and not on any effect produced by her actions on the appellate process, *State v. Branch*, 811 S.W.2d 11, 12 (Mo. App. 1991). In all proceedings below, there was no suggestion by the State that her failure to appear for sentencing in the trial court and three day flight had any effect on appellate system. App. 8. A decision by this Court revising the decision of the court below would be in direct conflict with the recent dictates of *Ortega-Rodriguez, supra*. *Ortega-Rodriguez* was a review by this Court of rules of the courts of appeals under its supervisory capacity. It did not recognize a Due Process requirement binding on the states. It did establish that fugitive dismissal must represent a rational exercise of the court's authority and that there be some connection between the fugitive status and the appellate process to make the appellate sanction a reasonable response. Unless this connection is there, the sanction results in an arbitrary application of the rule. This would be contrary to the previous rules established in *Evitts, supra*, at 404-05 and *Daniels v. Williams*, 474 U.S. 327, 331 holding that

substantive Due Process protects individuals from arbitrary government action.

The petitioner alleges that the decision of the court below decided a federal question which conflicts with *Estelle v. Dorough*, 420 U.S. 534 (1975). First, in *Estelle, supra*, the defendant escaped after he was sentenced and had filed an appeal to the Texas Court of Criminal Appeals. The dismissal sanction was imposed by the appellate court during the appellate process. In this case we are addressing the situation where Branch's absence and recapture occurred before the appeal. *Ortega-Rodriguez, supra*, recognized and accepted the deterrence rational of *Estelle* and held it could be an appropriate sanction by which to deter. However, until the jurisdiction is vested in the appellate court, the lower court is quite capable of defending its jurisdiction due to the wide range of penalties available to the lower court and rather than the blunderbuss of dismissal, the lower court can tailor a more finely calibrated response. *Ortega-Rodriguez, supra*.

The opinion of the court below did not abolish the fugitive escape rule or the rule of *Estelle*. It stated there are many situations consistent with the Federal Constitution, that the court may invoke this remedy and follow the rationale of *Estelle, supra*, and *Molinaro v. New Jersey*, 396 U.S. 365 (1970). It did require the pre-appeal flight to adversely affect the appellate process before the court could strip the defendant of the right to appeal under the Fugitive Dismissal Rule. In *Ortega-Rodriguez*, this Court recognized the rationales which supported dismissal in cases such as *Molinaro* and *Estelle*, but that these rationales represent a reasonable exercise of the court's authority. As stated in *Ortega-Rodriguez, supra*, at 1208.

Accordingly, we conclude that which a dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a

rule of dismissal for all appeals filed by former fugitives, returned to custody before the invocation of the appellate system. Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing appellate process," *Estelle*, 420 U.S., at 542, N. 11, the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.

The decision below is not in conflict with *Reno v. Flores*, 113 S.Ct. 1439 (1993). *Flores* reaffirms that the Fifth and Fourteenth Amendments' guarantee of due process contain a substantive component which prohibits the government from a certain "fundamental" liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. It is the compelling state interest which was found to be lacking when the court below and this Court in *Ortega-Rodriguez* required a nexus between the fugitive status and the appellate process. These cases hold that there is not enough of a compelling state interest in punishing conduct which exhibits disrespect for the judicial system to simply justify dismissal when there are no other effects on the appellate process. Branch was denied her appeal in a manner which affected her right to an appeal which is a fundamental process for the protection of liberty. This action is excessive and punitive and is not rationally connected with the need to protect the dignity of the appellate court when other more appropriate remedies are available to the State.

The opinion below is not in conflict with *Bowers v. Hardwick*, 478 U.S. 186 (1986). The issue presented in *Bowers* was whether the Federal Constitution conferred a fundamental right upon homosexuals to engage in sodomy. It held that "despite the language of Due Process Clauses of the Fifth and Fourteenth Amendments, which appear to focus

only on the processes by which life, liberty, or property is taken, the cases are numerous in which those clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Any such cases are those recognizing rights that have little or no textual support in constitutional language." *Bowers*, *Id.* at 191. The Court identified the nature of the rights qualifying for heightened judicial protection as those "implicit in the concept of ordered liberty", such that neither justice nor liberty would exist if they were sacrificed. It would also protect those liberties deeply rooted in this nation's history and tradition. This Court did not feel that the right of homosexuals to engage in sodomy should be afforded the protection of Due Process under the test of *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). *Bowers* does not establish the principle that the scope of fundamental rights of substantive due process will not be extended beyond the subject matter of intimate conduct or family relationships.

The decision below does not hold that the Due Process Clause will forbid the courts of Missouri or any other state from invoking the fugitive escape rule. It does not hold that the rationale of *Estelle* and *Molinaro* are never to be used for the imposition of this sanction. It does hold that when the absence and recapture occur before the appellate process begins, the justifications for the appellate sanction is attenuated and often will not apply. It does stand for the principle that the fugitive status must have an impact on the appellate process sufficient to warrant an appellate sanction to survive the established mandates of due process. The decision below follows the requirements announced by this Court in *Ortega-Rodriguez* and is not in conflict with other applicable decisions of this Court.

II. THE DECISION OF THE COURT BELOW DID NOT DECIDE A QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *TEAGUE V. LANE*, AND ITS PROGENY, BECAUSE THE FACTS OF THIS CASE FALL WITHIN ONE OF THE TWO EXCEPTIONS TO THE GENERAL NONRETROACTIVITY PRESUMPTION.

Assuming *arguendo* that the decision below established a new rule, then the question remains whether it comes within one of the two recognized exceptions under which a new rule is available for collateral review. In *Teague v. Lane*, 489 U.S. 346, 311, this Court recognized a second exception that a new rule may be applied on collateral review "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty'"'. *Teague, supra*, 498 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S., at 693). Qualifying the long accepted test in *Palko v. Connecticut*, 302 *supra*, 325, this Court limited the scope of the second exceptions to those new procedural rules without which the likelihood of an accurate conviction is seriously diminished. This exception has been repeatedly acknowledged following the *Teague* decision, see *Saffle v. Parks*, 494 U.S. at 495 (1990), *Button v. McKellar*, 494 U.S., (1990) at 415; *Caspari v. Bohlen*, 114 S.Ct. 948 (1994).

The Respondent, Lynda Ruth Branch, was sentenced to life imprisonment without eligibility for probation or parole. App. 44. She filed a consolidated appeal to the Missouri Court of Appeals of both her direct appeal and the appeal of the motion court's denial of post-conviction relief. The State moved to dismiss Branch's appeal on the basis of the escape rule. Following briefing and oral argument of the consolidated appeals, the Missouri Court of Appeals dismissed both the appeals

from the conviction and the denial of the post-conviction remedy. This was done without addressing the merits of any point raised in either appeal. *State v. Branch, supra*, S.W.2d 11 (Mo. App. 1991).

It has been held by this Court that the second exception of *Teague* is for "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. While the exact contours of the exception may be difficult to discern, the courts generally cite *Gideon v. Wainwright*, 372 U.S. 335 (1963) to illustrate the rule that comes within this exception. *Saffle v. Parks*, 494 U.S. at 495 (1990). It is further recognized that the retroactive effect is most appropriate where the new constitutional principle is designed to enhance the accuracy of criminal trials or a decision that goes to the heart of the truth-finding function. *Salem v. Stumes*, 465 U.S. at 643, 645 (1984).

The question becomes is whether the right to have another tribunal review the rulings of the trial court, both on direct and post-conviction appeals, is necessary to preserve the fundamental fairness and accuracy of the judicial process. Lynda Branch has received life imprisonment without parole and this procedure has only been examined by a single trial judge, both as to the conviction and the post-conviction relief. The Honorable Frank C. Conley presided at the trial and decided the post-conviction motion. There is no constitutional right to have an appellate process available in a criminal proceeding. However, once the State establishes such a process, it must comply with the Due Process Clause of the Federal Constitution's Fourteenth Amendment. *Evitts v. Lucey, supra* at 393. Once established, to invoke the second exception of *Teague*, this Court must determine the importance of an independent review of the trial court's ruling on the accuracy and fairness of the criminal proceeding. Isn't the protection given an individual by

post-trial judicial review as important as the right to counsel established in *Gideon*? This Court has previously held to be fundamental importance the jury selection process, *Brown v. Louisiana*, 474 U.S. 323 (1980) and the safeguards on the burden of proof, *Hankerson v. North Carolina*, 432 U.S. 233 (1977). None of these fundamental rights, or other established rights, can be preserved without the checks offered by an independent review in at least one stage of the appellate process. Lynda Branch has had every decision affecting her fate made by one judge, both at the trial on the merits and at the post-conviction action. Since no one person is infallible, it would be fundamental that to ensure the procedure is fair, the case be allowed to be examined by a different court. *Douglas v. California*, 372 U.S. 353 (1963), expanded *Gideon* to require counsel to be supplied for a criminal defendant on his first appeal of right. If the availability of counsel on appeal is dictated by the standards of due process, it is hard to imagine the underlying appeal process being less important to insure the integrity of the criminal process.

The respondent has not had the opportunity to present her claims to be addressed in the context of the State of Missouri's appellate process. In early criminal proceedings, an appeal was not recognized. The State has elected to establish and commit resources for an appellate system for both criminal and civil proceedings. For this elaborate system to be created and maintained by the State, there must be some recognition that it plays an important part of our legal process. The right to one appeal is necessary to invoke and preserve the procedural and substantive safeguards that distinguish our system of justice. When the State obtains a conviction without these safeguards, a serious risk of injustice infects our procedure. The appeal is a procedure which is needed to insure the accuracy of a conviction. It is clearly within

the second exception recognized in *Teague* and subsequent decisions of this Court.

III. THE DECISION OF THE COURT BELOW DID NOT DECIDE A QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *TEAGUE V. LANE*, AND ITS PROGENY, BECAUSE MISSOURI WAIVED *TEAGUE*'S NONRETROACTIVITY PRINCIPLE.

In the decision below, the court considered the threshold issue of whether the claim of the respondent was barred due to the nonretroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). The court held that if the nonretroactivity principle was applicable to Branch, it was waived by the manner in which the State responded to her appeal. Since this principle is not jurisdictional, the federal court may decline to apply the principle if the State fails to raise it. *Caspari v. Bohlen*, 114 S.Ct. 948, 953 (1994). If not properly presented, the nonretroactivity principle can be relinquished by the State. *Schiros v. Farley*, 114 S.Ct. 783, 788-89 (1994).

The Petitioner argues that the State preserved the issue throughout the proceedings below. It alleges *Teague* was asserted generally in response to the due process claim in the District Court. In spite of this "general assertion", Judge Bartlett did not address, recognize, or find the *Teague* principle depository in his opinion dated September 23, 1992. App. 17-26. The Petitioner further claims to have cited *Teague* in its brief before the Eighth Circuit in response to the argument that *Ortega-Rodriguez* applied to the State via the due process clause. App. n. 5. This was not identified as a ground in the question presented in the appellee's brief filed before the Eighth Circuit on June 18, 1993. App. 117. It only appears as

a passing reference by footnote. App. 129.

There were four opinions issued below by the Eighth Circuit. Any of these opinions could have used the nonretroactivity principle of *Teague* as a basis rejecting the claim of the respondent. The original opinion of *Branch v. Turner*, dated June 28, 1994 (App. 27-34) issued by Judge Fogg did not cite or address the *Teague* principle. The original dissenting opinion of Judge Bowman (App. 34-41) did not address or cite *Teague*. The second dissent of Judge Bowman dated September 27, 1994 (App. 9-16) did not cite or address *Teague*. *Teague* is only addressed in the modified opinion of September 21, 1994 issued by Judge Fogg when he declined to consider the retroactive application of a new rule in violation of *Teague* because Missouri had waived the issue. Had the issue been specifically and directly presented at the district court, in the appellee's brief and at oral argument as the petitioner suggests, it appears that this defense would have received consideration from the court below. The dissent, in both opinions, did not choose to rely on *Teague* in opposition to the decision nor did it address it as an issue before the court.

The court below points out that Missouri claims to have raised *Teague* in the district court. However, *Teague* was only mentioned in a one-sentence footnote buried on the last page of the State's lone argument. It held Missouri did not mention the nonretroactivity principle or cite *Teague* in its statement of issues on appeal and did not develop the *Teague* issue in its brief. App. 5. Citing their decision in *Larson v. Nutt*, 34 F. 3d 647 (8th Cir. 1994) stating that a skeletal assertion buried in a brief point does not raise the issue on appeal.

The waiver of the *Teague* principle is not contrary to previous decisions of this Court. In *Schiros v. Farley*, 114 S.Ct. 783, 788-89 (1994), this Court, relying on *Godinez v. Morgan*, 113 S.Ct. 2680, 2685, n.8,

recognized that a state can waive a *Teague* bar by not raising it. This Court recognized that it had the discretion to reach the State's *Teague* argument, it choose not to do so in *Shiro* because it had not been properly presented to the court and the desire to decide the merits once the case had been accepted for review. In *Collins v. Youngblood*, 110 S.Ct. 2715, 2718 (1990) this Court held the *Teague* rule not to be "jurisdictional" making it mandatory that this Court raise and decide the issue *sua sponte*.

Not only has this Court recognized that *Teague*'s rule can be waived, the waiver principle has been recognized in the circuits below when the issue is not properly presented. The Eighth Circuit in *Larson, supra*, at 648, relying on *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991), held a skeletal assertion buried in a brief point did not raise the issue on appeal. The Third Circuit in *Laborer's Intern. Union v. Foster Wheeler Energy*, 26 F.3d 375, 398 (3rd Cir. 1994) held an issue to be waived unless a party raises it in its opening brief and a passing reference to an issue will not bring the issue before the court. In *U.S. v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990), the First Circuit stated it was a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.

The decision below recognizes the settled rule that issues must be properly raised to be decided on appeal. The waiver of *Teague* below was not properly raised. This is not inconsistent with any decision of this or any court below. This Court has established that *Teague* is not jurisdictional and can be waived by the failure to raise and develop the issue and should not be considered *sua sponte*. In *Shiro, supra*, this Court exercised its discretion to decide the merits because this Court had accepted certiorari and once accepted, there was a need to decide the case on merits. This Court should not grant certiorari

based on the *Teague* principle because granting the writ would be contrary to the established rule that an issue must be properly presented to be reviewed. It was not presented or addressed by the court below.

CONCLUSION

The judgment of the court below is not in conflict with previous decisions of this Court. It follows the standards established by this Court in *Ortega-Rodriguez* which requires that this harsh remedy of dismissal be a reasonable exercise of the Court's authority and that the misconduct produce some disruption of the appellate process. It is clear the misconduct of the respondent had no effect on the appellate process. The decision below also follows the rule established in *Evitts*, which applies the due process standard once the State elects to establish an appellate process.

The opinion below does not abolish the fugitive dismissal rule. It recognizes that there are some circumstances where the imposition of the dismissal is an appropriate remedy to be used by the courts. However, the imposition of the dismissal rule was not appropriate in the circumstances of the respondent's appeal. Due process requires that there be some detriment be suffered to the appellate process which was not the case below. The respondent was denied her first appeal which has become a recognized and fundamental part of our criminal procedure. An appeal should not be denied on an arbitrary and irrational application of the fugitive dismissal rule. For these reasons this Court should not issue the Writ of Certiorari.

Respectfully submitted,
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